

Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp. and Albert Christmann and Rick Christmann. Cases 34-CA-8354 and 34-CA-8369

April 12, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND BRAME

On October 29, 1999, Administrative Law Judge Michael A. Marcione issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp., Freeport, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Terri A. Craig, Esq., for the General Counsel.

Robert M. Ziskin, Esq. and *Suzanne Harmon Ziskin, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on June 7 and 8, 1999.

¹ No exceptions were filed to the judge's dismissal of the allegation that the Respondent unlawfully threatened Rick Christmann with termination in violation of Sec. 8(a)(1) of the Act.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the allegation that the Respondent violated Sec. 8(a)(3) and (1) by terminating employee Albert Christmann was not barred by Sec. 10(b), Member Brame does not rely on *Ross Stores, Inc.*, 329 NLRB 573 (1999).

Additionally, in adopting the judge's finding that the General Counsel has established a prima facie case that the Respondent's discharge of employee Rick Christmann violated Sec. 8(a)(3) and (1), Member Brame finds it unnecessary to rely on statements by employees William Leahy and Eric Beck.

Albert Christmann¹ filed the charge in Case 34-CA-8354 on April 29, 1998, and his son, Rick Christmann,² filed the charge in Case 34-CA-8369 on May 14, 1998. Both charges were amended twice, in February and March 1999. Based on these amended charges, the consolidated complaint was issued on March 26, 1999, alleging that the Respondent, Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp., a single employer, violated Section 8(a)(1) and (3) of the Act. The Respondent filed its answer on April 2, 1999, which was subsequently amended on May 17 and 24, 1999, denying that it committed the unfair labor practices alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp. (the Respondent) are New York corporations with offices in Freeport, New York, where both are engaged as contractors in the building and construction industry. The Respondent admits and I find that they constitute a single-integrated business enterprise and a single employer within the meaning of the Act. The Respondent annually purchases and receives at the Freeport, New York facility goods valued in excess of \$50,000 directly from points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that International Union of Operating Engineers, Local Union No. 138 and Local Union No. 825 (Locals 138 and 825, respectively) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The 10(b) Issue

The complaint alleges specifically that the Respondent, through its alleged agent, William Leahy, on or about January 13, 1998, threatened employees with termination because they were not members of a labor organization. The Respondent moved to dismiss this allegation at the hearing on the grounds that no timely filed charge supported this allegation. The Respondent also denied that Leahy was its supervisor and/or agent. The complaint further alleges that the Respondent terminated Albert Christmann on November 26, 1997, because he was not a member of Local 138, and that it terminated Rick Christmann on February 13, 1998, because he was not a member of Local 825. The Respondent moved to dismiss the allegation regarding Al Christmann's termination on the basis that the charge alleged discrimination based on nonmembership in a different labor organization. Although the Respondent admitted terminating the Christmanns, it denied any unlawful motivation.

In *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board held that the catchall "other acts" language preprinted on the charge form does not provide a sufficient basis, on its own, to support any and all 8(a)(1) complaint allegations. Such

¹ The caption has been amended to reflect the correct spelling of the Charging Party's name.

² See fn. 1, *supra*.

8(a)(1) allegations must be closely related to the allegations or subject matter set forth as the basis for the underlying charge. The Board applies the same closely related test to both initial complaints and amended complaints. See *Redd-I, Inc.*, 290 NLRB 1115 (1988). This test is comprised of three factors: (1) whether the complaint allegations involve the same legal theory as the allegations in the charge; (2) whether the complaint allegations arise from the same factual circumstances or sequence of events as the charge allegations; and (3) whether a respondent would raise similar defenses to both allegations. The Board has recently re-affirmed this test, finding on facts similar to those here that there was a sufficient factual nexus between a timely filed 8(a)(3) discharge allegation and two untimely filed 8(a)(1) allegations of an amended charge. *Ross Stores, Inc.*, supra.

The allegation regarding the statement attributed to Leahy shares a common legal theory with the allegation that Rick Christmann was discharged because of his nonmembership in a labor organization. The specific statement alleged to be unlawful in the amended charge is relied on by the General Counsel as evidence of the Respondent's animus. The Board, in *Ross Stores*, supra, found that this common aspect of animus was sufficient to meet the *Nickles Bakery* and *Redd-I* test. In addition, the allegation of the amended charge clearly arises out of the same factual circumstances and sequence of events as the allegation regarding Rick Christmann's discharge. Because the statement is relied on by the General Counsel as proof of the Respondent's animus and motivation, the Respondent is likely to raise similar defenses to both allegations. Accordingly, I find that a sufficient factual nexus exist between the allegations of the amended charge and those of the original charge and deny the Respondent's motion to dismiss paragraphs 8 and 13 of the complaint.

I find further that the February 24, 1999 amendment of the charge in Case 34-CA-8354 to specifically allege that it was Al Christmann's nonmembership in Local 138, rather than Local 825, which motivated his termination did not render the complaint allegation untimely. The allegations of the charge and amended charge involved the same legal theory, i.e., that the charging party's nonmembership in a labor organization motivated his termination, and arose out of the same factual circumstances and sequence of events, i.e., the employment and termination of Al Christmann. The Respondent would raise similar defenses, regardless of the identity of the particular union involved, i.e., that it's decision to terminate Al Christmann was motivated by factors other than his lack of membership in a labor organization. The amendment of the charge did nothing more than correct a factual inaccuracy in the original charge. Accordingly, I shall deny the Respondent's motion to dismiss paragraphs 9 and 11, and that portion of paragraph 14 relating to Al Christmann's discharge.

B. Background and Supervisory/Agency Issues

As admitted by the Respondent, Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp. are a single employer. Scalamandre is the direct employer of labor and provides the equipment while Sea Crest serves as the contractor on construction projects. Scalamandre has been a member of the Long Island Contractors Association for many years and, through this membership, has been party to successive collective-bargaining agreements with Local 138 covering work in Nassau and Suffolk counties on Long Island. In 1997 and 1998, Sea Crest was

the general contractor on a project to build military housing for the U.S. Army at West Point, New York. This project is referred to as the Stony Lonesome project. West Point is outside Local 138's geographic jurisdiction, but within the jurisdiction of Local 825. The Respondent did not have a collective-bargaining agreement with Local 825 until January 1998. Prior to November 1997, the only union-represented employees working for the Respondent in West Point were laborers belonging to Laborers Local 17.³ The Christmanns, who did not belong to any union, worked for the Respondent as operating engineers at the Stony Lonesome project.

The Stony Lonesome project was built in three phases. All three phases involved extensive site work, such as blasting, excavating, installing water pipe and other underground utilities, grading, roadway construction and drainage. The same types of heavy construction equipment and the same classifications of employees were used on all three phases. The first phase, Bravo, was completed around Christmas 1997. The second, or Alpha phase, started in the fall of 1997 and was completed by spring 1998. Site preparation for the final phase, called Delta and Echo, started around January 1998. The entire project was completed in August 1998. Damon DeSimone was the Respondent's project manager at Stony Lonesome. He spent most of his time in the office trailer. Paul Borger was the Respondent's site superintendent coordinating the work of the subcontractors. About November 1, 1997, Paul Vander Schuyt came to the project as the Respondent's field superintendent. He and Borger reported directly to DeSimone. Both Borger and Vander Schuyt spent most of their time in the field, overseeing the actual construction. After Vander Schuyt arrived, Borger concentrated on the construction of the buildings and Vander Schuyt on the site work. The Respondent admits that DeSimone, Borger, and Vander Schuyt are statutory supervisors and its agents within the meaning of the Act. In addition to these undisputed supervisors, the Respondent employed several foremen whose status is in dispute. The General Counsel alleged and the Respondent denied that William Leahy is a statutory supervisor and that Eric Beck and Dominic Milone III (also referred to in the record as Dominic Senior) were agents of the Respondent.

Beck was initially employed by the Respondent as a laborer. He is a member of Laborers Local 17 and was its steward on the job. At some point before the events at issue here, he also became the laborer foreman. Because the Respondent directly employed few equipment operators prior to November 1997, Beck also served as foreman for the operators. Al Christmann testified that he was told by Borger, when he first reported to the site as an employee of the Respondent, to see Beck for his work assignment and that it was Beck who would tell him what to do every day. According to Christmann, Beck also occasionally reassigned him during the course of the day when material was needed at other parts of the jobsite. Beck continued to assign and direct the work of the operators until the Respondent brought Dominick Milone III, a member of Local 138, to the job in mid-November. From that point on, it was Milone who told the Christmanns and the other operators what to do each day. It is undisputed that Beck also was responsible for keeping

³ Because the job was covered by the Davis-Bacon Act, all employees on the site were paid prevailing wages which were equivalent to the wages and fringe benefits paid to union-represented employees in the area.

track of employees' time and distributing paychecks, before and after Milone arrived. Beck also ran weekly safety meetings for the employees throughout the project. It was Beck who informed Al Christmann that he was being laid off and Milone who informed Rick Christmann of his layoff.

There is less evidence in the record regarding Leahy's duties and responsibilities. The Christmanns identified him as the Respondent's quality control person. From their testimony, it appears that he was in charge of installing water lines and other utilities and was limited to directing the work of those crews performing such work. Al Christmann testified that Leahy had been the pipe foreman for Bryland Paul and Gayle Construction at the site before working for the Respondent and that part of Leahy's job for the Respondent involved taking pictures to document the underground utility work before it was covered. Leahy occasionally acted as foreman over Rick Christmann when he was assigned to one of the crews digging for and laying pipe. According to Rick Christmann, when he worked on Leahy's crew, for about 3 weeks in January 1998, it was still Beck who assigned the work. In addition, Leahy also "labored" to get the pipe in the ground with the rest of the crew, using shovels and other tools.

Vander Schuyt admitted that the foremen helped him run the job and that he specifically brought Milone from Long Island to "run the fields," not to operate equipment. Vander Schuyt testified that he met with Leahy, Beck, Milone, and two other laborer foremen every day at lunch to plan the next day's work. They would discuss manpower and equipment needs to complete each day's work. The foremen were then responsible for implementing these plans by making work assignments and making sure the equipment and material was in place to do the work. At these meetings, Vander Schuyt also discussed with the foremen overtime requirements, based on recommendations made by the foremen. If he authorized any overtime, the foremen would be responsible for communicating that information to the employees. Similarly, when a reduction in manpower was required, Vander Schuyt discussed this with the foremen, selecting the individuals for layoff by consensus. The respective foreman would then be responsible for communicating this decision to the employees on his crew who were selected for layoff. Vander Schuyt acknowledged that employees who wanted time off or to leave the job before the workday was over would communicate the request to their foreman first who would relay the information to him. Vander Schuyt identified Milone and Beck as his two key guys on the job, on whom he relied the most in bringing the job to completion. In fact, Milone would assume Vander Schuyt's duties and responsibilities when he was away from the site on vacation.

Based on the above, I find that there is insufficient evidence that Leahy exercised any of the specific categories of authority listed in the statute as evidence of supervisory status. He appears to have had even less authority than Beck and Milone, whom the General Counsel concedes were not supervisors. At most, he directed the work of the crews performing utility work. However, in doing so, he did not exercise any independent judgment but merely used his superior skill and expertise to ensure that the plans and specifications were carried out. Even assuming he held some type of quality control position with the Respondent, there is no evidence that he possessed any independent authority vis a vis other employees in this capacity. As the party asserting that Leahy was a supervisor at the time of the alleged unlawful conduct, the burden is on the General

Counsel to prove that he possessed and exercised at least one of the statutory indicia of supervisory authority. The General Counsel has not met her burden as to Leahy. Accordingly, I find that Leahy was not a supervisor of the Respondent within the meaning of Section 2(11) of the Act. *Hausner Hard-Chrome of Ky, Inc.*, 326 NLRB 326 (1998); *Great American Service Products*, 312 NLRB 962, 962-963 (1993); *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991).

Although the evidence is insufficient to establish that Leahy is a supervisor, there is sufficient evidence in the record to establish that the Respondent placed him, along with Beck and Milone, in positions where they served as the conduit of information between the Respondent's management and employees. Vander Schuyt admitted that he relied on these three foremen to carry out his plans to accomplish the work by making assignments and directing the crews in the field. These foremen communicated decisions regarding work assignments, layoffs and overtime to the employees in the field. In return, they communicated employees' requests for time off to the office. In addition, Beck communicated safety messages to the employees at weekly meetings, kept track of employees' time for payroll purposes and was the individual employees looked to for their paychecks every week. Under well-established Board law, the Respondent cloaked these three individuals with the apparent authority to speak and act for management. See *Hausner Hard-Chrome of Ky, Inc.*, *supra*, and cases cited therein. See also *Zimmer Plumbing Co.*, 325 NLRB 106 (1997). Whether employees could reasonably believe that each was reflecting company policy and speaking and acting on behalf of management with respect to the particular statements attributed to them will be discussed later in this decision.

C. Facts Regarding Al Christmann

The Respondent performed most of the site work on the first two phases through subcontractors and did not directly employ any equipment operators until April 1997. Both Al and Rick Christmann were first employed at Stony Lonesome by one of the subcontractors, Bryland Paul Construction. Al Christmann began his employment at the site in October 1996 and Rick Christmann in November 1996. The Respondent terminated its contract with Bryland Paul in February 1997, at which time the Christmanns were laid off with the rest of Bryland Paul's employees. During the time that they worked for Bryland Paul, Borger was indirectly overseeing their work as the Respondent's project superintendent. The Respondent subsequently contracted with another subcontractor, Gayle Construction, to finish the site work on Bravo and start Alpha. Many of Bryland Paul's employees, including Rick Christmann were hired by Gayle. Al Christmann was not hired by Gayle but he was hired by the Respondent on April 17, 1997. Rick Christmann was hired by the Respondent on August 4, 1997. The Respondent disputed the testimony of the Christmanns regarding how they came to be employed by the Respondent.

Al Christmann has 40 years' experience as a heavy equipment operator. He testified that Borger called him at home in March 1997, about a month after he was laid off by Bryland Paul, and asked if he would be interested in working for the Respondent at an offsite location, loading material for the Stony Lonesome project onto trucks with a 500 Komatsu pay-loader. Al Christmann accepted employment with the Respondent and started working at a pit in New Windsor, New York, about 5 miles from the Stony Lonesome site, on April 17, 1997.

The Respondent's records show that he was one of the first operators hired to work directly for the Respondent. Al Christmann was the only operator working at New Windsor and he reported directly to Borger and DeSimone. In about June 1997, according to Al Christmann, Borger, and DeSimone told him that the Respondent was going to close the New Windsor operation because material he was loading at that pit was not satisfactory. Al Christmann was told to "dress up the pit" and the Respondent would make arrangements to move the Komatsu to Stony Lonesome. When Al Christmann asked if they would need him anymore, DeSimone said, "[W]e can always use a guy like you down here on the site." DeSimone told Al Christmann to report to the site the following Monday and they would find something for him to do. As noted above, when he reported to the site, Borger directed him to see Beck, who was the laborer steward and foreman, and Beck put him on a small dozer to do some grading while he waited for the Komatsu to be brought down from New Windsor. After the Komatsu arrived, Al Christmann operated this piece of equipment almost exclusively until November 1997. During that time, he got his assignments in the morning and throughout the day from Beck. Borger and DeSimone denied, in response to leading questions, that the Respondent solicited Al Christmann to work for the Respondent, or that they ever told him words to the effect that he was the type of operator Respondent needed. However, none of the Respondent's witnesses explained how Al Christmann came to be employed by the Respondent.

According to Al Christmann, when he first arrived at the Stony Lonesome job as an employee of the Respondent, the only other operators working for the Respondent were Billy Dunn and Scott McCormick. Al Christmann testified that the Respondent was also using two laborers as equipment operators. He identified them as Bobby Warren and a guy named Millis, known as "Cowboy." The parties stipulated that the Respondent employed a James Warren and a Robert Millis, who were members of Laborers Local 17 at the Stony Lonesome job. The parties stipulated that they were hired on August 4 and 11, 1997, respectively. This was about the same time that the Respondent hired Rick Christmann. The parties also stipulated that both Dunn and McCormick were not members of any union and that Dunn was hired April 17, 1997, the same date as Al Christmann, and that McCormick was hired August 28, 1997.

About November 1, Vander Schuyt arrived on the job and took over responsibility for the site work from Borger. Al Christmann testified that he spoke to Vander Schuyt soon after his arrival on the job. Al Christmann was screening topsoil at the time. Vander Schuyt asked him how the job was going and he replied, "[Y]ou must have your hands full, with Laborers running equipment." According to Al Christmann, Vander Schuyt replied that that would soon change because he was going to bring up some operators from Local 138 on Long Island. On cross-examination, Al Christmann acknowledged that Vander Schuyt also told him that the job was going too slow and that he had to bring in more operating engineers to make things go faster. He testified that Vander Schuyt did not mention whether or not the operators he would bring from Long Island belonged to any union.

Al Christmann recalled that the first operators from Local 138 arrived a couple weeks after Vander Schuyt. The first to come to the job were Dominic Milone III, who became the foreman and took over some of Beck's responsibilities as noted

above, and his son, Dominic Milone IV.⁴ The parties stipulated that the Milones started at Stony Lonesome on November 17, 1997. Al Christmann testified that soon after the Milones arrived, he was taken off the Komatsu and reassigned to an excavator. Milone the younger was assigned to the Komatsu. According to Al Christmann, Vander Schuyt did this after the younger Milone damaged a bulldozer while pulling out trees. He testified that Vander Schuyt told him that "maybe it would be easier for [the young] Dominic to operate" the Komatsu. Al Christmann recalled that he worked on the excavator finishing up a section of road in the Delta section for about a week and then was assigned to operate a bulldozer stockpiling topsoil. Milone the elder gave him this assignment. This is the job that Al Christmann was doing for the remainder of his employment by the Respondent.

Al Christmann's last day was Wednesday, November 26, 1997, the day before Thanksgiving. According to Al Christmann, he continued to stockpile topsoil using the bulldozer without incident. At lunchtime, he stopped by the office trailer to wish the management and supervisors a happy holiday. Nothing was said to him about a layoff until the end of the day. According to Al Christmann, Beck handed him his check at the end of the day and said: "[T]hey're not going to need you any longer. They're bringing guys up from Local 138." When Al Christmann expressed shock, Beck told him again, "you're finished; you're laid off." According to Al Christmann, no one criticized his job performance, or indicated that he was doing anything wrong either before or at the time of his layoff. Al Christmann admitted that no foreman or supervisor ever asked him to join any union or told him that his continued employment was contingent on joining a labor organization. In fact, the only comment anyone made to him about any union was Beck's statement at the time of his layoff.

Beck, who no longer works for the Respondent, denied telling Al Christmann that he was being laid off because the Respondent was bringing in operating engineers from Local 138. According to Beck, he told Al Christmann that he was being laid off because of a lack of work. Although Beck could not recall when he gave Al Christmann his layoff, he recalled that he laid off two of his own laborers the same day because the job was winding down. The parties' stipulation shows that no one else was laid off the same day as Al Christmann and that only one laborer, James Warren, was laid off around that time, i.e., 2 days before, on November 24, 1997. This stipulation also shows that another member of Local 138, William Biemann, started at the Stony Lonesome job on November 23, 1997, a few days before Al Christmann was laid off, and that two more members of Local 138, Dean Ciccione and Scott Lucas, started the following Monday, December 1, 1997. After Al Christmann's layoff, the Respondent employed five operating engineers who were members of Local 138 and three who did not belong to any union (Rick Christmann, Dunn, and McCormick). At the time, the Respondent was not a party to any collective-bargaining agreement covering the operating engineer's work at Stony Lonesome.

Vander Schuyt disputed Al Christmann's testimony regarding the reason for his reassignment from the Komatsu to other equipment. Vander Schuyt testified that he spent the first week at the job, in early November, just observing the progress of the

⁴ They are referred to throughout the record, somewhat erroneously, as Dominic Sr. and Dominic Jr.

work and the performance of the operators on site. He decided that the job was moving to slowly and that he needed more experienced operators to get the job going. He had just finished a highway interchange project on Long Island, utilizing members of Local 138, and asked the Milones, who had worked for him before, to come to Stony Lonesome. As noted above, he specifically brought Milone the elder to Stony Lonesome to help him run the job as his operator foreman. Vander Schuyt testified that the other members of Local 138 who came to Stony Lonesome had also worked for him in the past on Long Island and that he knew them to be good operators, proficient at running various machines.

With respect to Al Christmann, Vander Schuyt testified that he observed him operating the Komatsu, screening topsoil, in first gear forward and reverse. He asked Al Christmann to pick up the speed, i.e., to run it in second gear forward and third gear reverse. Despite this instruction, he observed that Al Christmann continued to operate in first gear. Vander Schuyt could not recall with any certainty whether he spoke to Al Christmann again about this. Al Christmann specifically denied that Vander Schuyt ever spoke to him about the speed at which he was operating the Komatsu. Vander Schuyt also disputed the reason for putting Milone the younger on the Komatsu. According to Vander Schuyt, when he observed that Al Christmann had not increased his speed, he decided to try another operator on the equipment to determine if there was a problem inherent in the operation causing Al Christmann to run in first gear. He did not specifically dispute Al Christmann's testimony that Milone the younger had damaged a bulldozer before this change in assignments.

Vander Schuyt testified that he made the decision to lay off Al Christmann and that he did so solely because he was not satisfied with the way he was operating the Komatsu. He specifically denied that Al Christmann's nonmembership in a union had anything to do with his decision and specifically denied that any union requested that Al Christmann be laid off. Vander Schuyt did not corroborate Beck's testimony that Al Christmann's layoff was caused by a lack of work. Beck made no mention of any problems with the way Al Christmann was operating the equipment. According to Beck, when he and the other foreman met with Vander Schuyt in the trailer the day before the layoff they only discussed the need to cut the crew. He recalled that no reason was given for the layoff of Al Christmann other than the lack of work.

D. Facts Regarding Rick Christmann

Rick Christmann testified that, after he was laid off by Bryland Paul, he was called by Borger and told to apply for work with Gayle Construction. When he first applied with Gayle, Rick Christmann was told that they didn't need any operating engineers. He testified that he reported this to Borger who told him that he would talk to Gayle Construction. Soon thereafter he was hired by Gayle and returned to work at Stony Lonesome in about June 1997. Rick Christmann testified further that, in late July, he was approached on the job by DeSimone and solicited to work for the Respondent. When Rick Christmann asked for how long, DeSimone told him until the job was done. Rick Christmann accepted employment and started working for the Respondent the following week, i.e., on August 4, 1997. Borger and DeSimone disputed this testimony but did not explain how Rick Christmann came to be an employee of the Respondent.

Rick Christmann testified that he was generally assigned to run a 220 Kumatsu, doing various things, such as backfilling

foundations, grading, digging for footings and drainage work. He ran the 220 Kumatsu for about 4 months, into December 1997. He then operated a special backhoe for about a month before going back on the Kumatsu. When he went back on the 220, he was working on starting the water lines on phase three with a crew under the direction of Leahy. According to Rick Christmann, he operated the Kumatsu on this crew until about the time that the Respondent signed a collective-bargaining agreement with Local 825 when he was taken off that equipment and put on the roller, or compactor, as part of a crew bringing the road up to grade level. A member of Local 825 whose name he recalled was Tony was assigned to operate the Kumatsu.⁵ It was Milone the elder who informed the employees of these assignments. Rick Christmann worked on the roller until about 3 days before his termination when he was assigned to a bulldozer, working on the same part of the job.

Rick Christmann testified that, toward the end of December 1997, in the parking lot up on the hill, Beck told him that the Respondent was going to sign a contract with Local 825. Beck told Rick Christmann that, if they did, the Respondent would have to offer Rick a union book and could not lay him off. Rick Christmann testified that he told Beck that would be great because he always wanted to join the Union. About a week to 10 days later, Beck told Rick Christmann that the Respondent had signed the contract and would now have to give him a union book. It was about this time that Rick Christmann was reassigned to the roller. He testified that he spoke to Vander Schuyt the day after his reassignment and asked if this meant he was being laid off because the last guy who worked on the roller had been laid off.⁶ According to Rick Christmann, Vander Schuyt told him, "No, you'll be back on your 220." Rick Christmann testified that he also questioned DeSimone about his job assignment and that DeSimone told him, "[D]on't worry about it; keep your mouth shut; the pay's the same." Vander Schuyt and DeSimone deny making such statements.

Rick Christmann testified that he also spoke to Beck about his reassignment to the roller, after the contract was signed and that Beck said, "[J]ust keep your mouth shut. Local 825 wants you off this job." Rick Christmann told Beck that he wanted to speak to Mike Hamm about getting a union book. Hamm was the Local 825 steward on the job and the son of the business representative who negotiated the contract with the Respondent. Hamm was also one of the first Local 825 members to be hired by the Respondent. Beck told Rick Christmann that he would speak to Hamm. Although Rick Christmann did speak to Hamm, he was never offered a union book. Beck denied having these conversations with Rick Christmann. Rick Christmann testified that he had a similar conversation with Leahy, also in the parking lot within a couple days of being put on the roller and that Leahy also told him to "keep [his] mouth shut because Local 825 wants [him] off the job."⁷ After the General Counsel refreshed his recollection with his affidavit, Rick Christmann recalled that Leahy also told him that Borger had saved his job. Leahy did not testify in this proceeding. Rick Christmann testi-

⁵ The parties' stipulation shows that a member of Local 825 named Anthony Fairbairn started work at the site on January 19, 1998.

⁶ The parties' stipulation shows that Scott McCormick was laid off on January 9, 1998, and that Scott Lucas, one of the Local 138 members was laid off on January 1, 1998. The first two members of Local 825 appear at the job on January 5, 1998.

⁷ This is the only statement that the General Counsel alleges is unlawful.

fied that he went to the trailer the following day and thanked Borger for saving his job. According to Rick Christmann, Borger replied, "[N]o problem, you're the best operator we got." Borger denied ever telling Rick Christmann that he was the best operator on the job.

Rick Christmann testified that on his last day of work, February 13, 1998, he was using the bulldozer to push up fill and the roller to compact it as trucks delivered the fill. This is the same work he had been doing since being taken off the 220 Kumatsu. About 2 p.m. that afternoon, after he'd finished all the loads of fill that had been delivered, Milone the elder came to him with his check and said, "I hate to do this, they no longer need you." When Rick Christmann asked why, Milone said, "[Y]our job is done." No other reason was given. According to Rick Christmann, his job was not done because the road still had to be raised another 10 feet to grade level. Rick Christmann testified that he had no prior warning or indication that he would be laid off. Rick Christmann admitted that no representative of the Respondent ever threatened him about his lack of membership in the Union or told him that he had to join a union if he wanted to continue working for the Respondent.

The record establishes that the Respondent signed a collective-bargaining agreement with Local 825 on January 13, 1998. According to Vander Schuyt, representatives of Local 825 came to the job and demanded that the Respondent sign their contract because the Respondent was a union contractor employing union members in their geographic jurisdiction. Local 825 threatened to picket the job if the Respondent refused. The Respondent quickly acquiesced to this demand and almost immediately hired two members of Local 825. The parties stipulation shows that the first Local 825 members started working for the Respondent at Stony Lonesome on January 5, 1998. According to Vander Schuyt, the collective-bargaining agreement was sent to the Respondent's office in Long Island to be reviewed and signed. With the signed contract, the Respondent submitted an attachment purporting to identify those employees on its payroll performing work covered by the contract within the Union's jurisdiction. The only employee listed is William Dunn.

Vander Schuyt denied that Rick Christmann's nonmembership in the Union had anything to do with his layoff. He also denied that Local 825 requested that Christmann be laid off. Vander Schuyt testified that the sole reason Rick Christmann was laid off was that the Respondent ran out of work for him. Specifically, according to Vander Schuyt, there was no more work for the roller. Vander Schuyt also testified that lack of skill was not a reason for Rick Christmann's layoff. This was contrary to the position taken by the Respondent's counsel in two letters to the Board's Regional Office submitted during the investigation. Vander Schuyt conceded that the position letters were inaccurate. Vander Schuyt also insisted that no one was hired to replace Rick Christmann. This testimony was contradicted by the parties' stipulation which shows that a member of Local 825, Charles Miller, started working for the Respondent the next working day. Moreover, daily work schedules in evidence show that Miller was assigned to the very same road fill job that Rick Christmann had been working on. Miller continued to work on this part of the job, albeit with a different bulldozer and operating both the dozer and roller as needed, through the end of March. The daily work schedules also show that the other operator working with Rick Christmann at the time of his layoff, William Biemann, was transferred to work

on another part of the job and was not laid off. Biemann was a member of Local 138.

At the time of his layoff, Rick Christmann was the only operator who did not belong to any union. Scott McCormick had been laid off on January 9, 1998, before the Respondent signed its contract with Local 825. Billy Dunn, the other nonunion operator who had worked for the Respondent since April 1997, joined Local 825 on February 10, 1998. He remained an employee of the Respondent until August 4, 1998. The Respondent did continue to employ one nonunion member, Thomas Avery, in the classification of mechanic/welder. In that position, he was responsible for maintenance and repair of all equipment on site. Such a position is usually covered by the collective-bargaining agreement with local unions of the Operating Engineers. Vander Schuyt testified that Avery quit voluntarily for other employment on April 17, 1998.

E. Analysis and Conclusion

1. The 8(a)(1) allegation

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act, on or about January 13, 1998, by threatening employees with termination because they were not members of a labor organization. This allegation is based on Rick Christmann's testimony that Leahy told him to keep "his mouth shut because Local 825 wants him off the job." I found Rick Christmann to be a generally credible witness and have no doubt that Leahy made such a statement. Moreover, because Leahy did not testify in this proceeding, Rick Christmann's testimony regarding this conversation is un rebutted. As found above, however, Leahy was not a statutory supervisory of the Respondent at the time he made this statement. The only way the statement may be attributable to the Respondent is if Leahy was acting as an agent of the Respondent when he made the statement, i.e., if an employee "would reasonably believe that [Leahy] was reflecting company policy and speaking and acting for management." See *Hausner Hard-Chrome of Ky., Inc.*, supra, and cases cited therein.

As found above, the Respondent placed Leahy and the other foremen in a position where they acted as conduits of information between management and the employees with respect to their job assignments and other aspects of the work. At the time Leahy made this statement to Rick Christmann, he was not Christmann's direct foreman because Christmann had already been reassigned from Leahy's crew to working on the roller where he was under the elder Milone's direction. In addition, Leahy's warning to Christmann went beyond the normal information conveyed by the foremen to the employees in the field and did not even purport to be a statement of the Respondent's views or position on the question of union membership. On the contrary, Leahy was communicating what Local 825 allegedly wanted, not what the Respondent wanted. In fact, in the same conversation, Leahy told Rick Christmann that Borger, an admitted supervisor, had saved Christmann's job, suggesting that the Respondent did not want Christmann off the job. Under these circumstances, I find that Rick Christmann could not reasonably believe that Leahy was reflecting company policy or speaking and acting for management when he made the statement attributed to him by the Respondent. Accordingly, I find that the Respondent did not unlawfully threaten Rick Christmann with termination in violation of Section 8(a)(1) of the Act through Leahy's statement.

2. The 8(a)(3) allegations

The complaint alleges that the Respondent terminated the Christmanns because of their nonmembership in a labor organization and in order to encourage membership in either Local 138 or Local 825. In cases such as this, that turn on employer motivation, the Board applies the test it first established in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The General Counsel must show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once such a showing is made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. See *Naomi Knitting Plant*, 328 NLRB 1279 (1999). Because there is seldom direct evidence of unlawful motivation, i.e., the proverbial "smoking gun," the Board frequently relies upon circumstantial evidence to prove motive. See *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), *enfd.* 837 F.2d 575 (2d Cir. 1988).

In the instant case, there is no dispute that the Christmanns were not members of any labor organization. This status is the extent of their protected activity as there is no evidence that they were asked to and refused to join any union, that they sought to avoid joining a union or engaged in any other overt conduct that would be protected by Section 7 of the Act. Their status as nonmembers, however, is enough to satisfy the first part of the General Counsel's burden to prove a *prima facie* case. The Board has held that the discharge of an employee because he is not a union member is considered to be discriminatory because it has the natural consequence of encouraging membership in a particular union. *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777, 778-779 (1984), *enfd.* 782 F.2d 1030 (3d Cir. 1986). See also *DuBose Masonry, Inc.*, 279 NLRB 909 (1986); *Laidlaw Waste Systems*, 275 NLRB 1025 (1985); *J. Willis & Son Masonry*, 191 NLRB 872 (1971). Thus, if the General Counsel has established that their status as nonmembers was a motivating factor in the Respondent's decision to terminate Al and Rick Christmann, then he has met his *prima facie* burden.

The record contains no direct evidence of unlawful motivation for Al Christmann's termination. Instead, the General Counsel relies on circumstantial evidence, including the statement made by Beck when he informed Al Christmann of his layoff, to prove that his nonmembership in Local 138 motivated the Respondent to terminate him. Al Christmann was abruptly terminated the day before Thanksgiving, within 2 weeks of the arrival of the first unionized operating engineers on the job. According to Al Christmann, Vander Schuyt told him soon after Vander Schuyt arrived on site that he was going to bring Local 138 members to the job to get it moving. At the time of his layoff, Beck told Al Christmann that the Respondent wouldn't be needing him anymore "because they're bringing up guys from Local 138." No other reason was given for his layoff. Although Beck denied making this statement, I credit Al Christmann's testimony in this regard. Beck appeared to have little recall of the events and his testimony proved to be false. Beck insisted the only reason Al Christmann was laid off was that the job was winding down and that others were laid off at

the same time. Vander Schuyt contradicted Beck regarding the reason for the layoff and the parties' stipulation shows that the employee complement on the job was increasing, not decreasing, at the time of Al Christmann's layoff. Finally, Beck's statement that the Respondent was bringing up Local 138 members proved to be true because two Local 138 members started the next working day after Al Christmann's layoff. Although Beck was not a supervisor, Beck's statement was well within the scope of his apparent authority as a foreman since one of his responsibilities as foreman was to communicate layoff decisions to employees. Under these circumstances, Al Christmann could reasonably believe that Beck was speaking and acting for management when he told Christmann that the Respondent didn't need him anymore because it was bringing up Local 138 operators.

In addition to the timing of the layoff and Beck's statement, the General Counsel argues that the reason proffered by the Respondent at the hearing was a pretext. The Board has long held that unlawful motivation may be found where an employer provides false or shifting reasons for its actions. *Naomi Knitting Plant*, *supra*; *WECO Cleaning Specialists, Inc.*, 308 NLRB 310, *fn.* 4 (1992). Vander Schuyt testified that the sole reason for Al Christmann's layoff was his failure to operate the 500 Komatsu payload in the manner Vander Schuyt desired despite specific instructions from Vander Schuyt to increase his speed. Al Christmann denied that Vander Schuyt ever instructed him to increase his speed on the payload. I found Al Christmann a generally more credible witness than Vander Schuyt. As will be shown in connection with Rick Christmann's case, Vander Schuyt was often contradicted by company documents. Moreover, I find it highly unlikely that Al Christmann, an operator with 40 years' experience who had worked as a foreman, would ignore a project superintendent's instructions to change the speed at which he was operating equipment. Had Vander Schuyt told Al Christmann to operate in second gear forward and third gear reverse, I am sure he would have done so. Finally, I note that, by the time he was laid off, Al Christmann had already been taken off the 500 Komatsu and was operating a different piece of equipment. Thus, even if Vander Schuyt was dissatisfied with the way Al Christmann operated the Komatsu, he had already corrected the problem.

Having found that the asserted reason for Al Christmann's termination was false, I must determine whether the true reason is the unlawful one that the General Counsel claims. The record contains no evidence of animus on the part of the Respondent toward Al Christmann's lack of union membership. In fact, the Respondent hired only nonunion equipment operators until November 1997 and retained three nonmembers, including Al's son, after Al Christmann's layoff. Even Beck's statement, i.e., that the Respondent was bringing up Local 138 members, does not prove a motivation to encourage membership in that organization. The Respondent's contract with Local 138 did not apply to the Stony Lonesome job and no employees were told they would have to join Local 138 to keep their employment. There is no evidence that Local 138 requested the Respondent terminate its nonunion operators. Moreover, Al Christmann acknowledged that Vander Schuyt indicated dissatisfaction with the progress of the job and a plan to bring in more experienced operators from Long Island a couple weeks before his layoff. Its preference for employees who were members of Local 138, and with whom the Respondent was familiar from prior jobs, is not proof of any unlawful motivation, particularly

where the Respondent retained an almost equal number of non-union operators.

Having considered the evidence, I find that the General Counsel has failed to establish a prima facie case that Al Christmann was terminated because of his nonmembership in Local 138 and in order to encourage membership in that Union. While the circumstances surrounding his layoff, as noted above, create suspicion regarding the true motive for the termination, suspicion is not enough. When that suspicion is balanced against the Respondent's history of hiring nonunion operators, its stated need to bring in experienced operators to get the job moving, and the Respondent's retention of other nonmembers of the Union for several months after Al Christmann's layoff, I am not convinced that a preponderance of the evidence supports a finding the Al Christmann's nonmembership in the Union was a motivating factor in his layoff. Accordingly, I shall recommend that the complaint be dismissed to the extent it alleges that Al Christmann's termination violated Section 8(a)(3) and (1) of the Act.

The General Counsel's case with respect to the termination of Rick Christmann is much stronger. Rick Christmann was abruptly terminated from a job he had worked on for more than 6 months without any reason being given. By the time he was terminated, the Respondent had signed a collective-bargaining agreement with Local 825 requiring it to use the Local 825 hiring hall as a source of employees. The Respondent omitted Rick Christmann's name from its certification to the Union of employees on the payroll performing work within the Union's jurisdiction. The only other nonunion equipment operator remaining after the contract was signed, William Dunn, joined the Union a few days before Rick Christmann was terminated. In addition to these facts, the asserted reasons for Rick Christmann's termination proved to be false and ever-changing. Vander Schuyt insisted at the hearing that the sole reason for Rick Christmann's layoff was a lack of work for him. This was contrary to the position asserted by the Respondent in two letters from its counsel submitted during the investigation. Vander Schuyt acknowledged at the hearing that the reasons asserted in the letters were not true.⁸ Moreover, Vander Schuyt's testimony that there was no more work for Rick Christmann was contradicted by company records showing that a Local 825 member started work at the site the next working day and was assigned to the same aspect of the job, spreading and compacting fill for the roadway. This new employee operated the same type of equipment, a bulldozer and the roller, intermittently for weeks afterward while the Local 138 operator who had been working with Rick Christmann was simply reassigned to another part of the job. These circumstances are sufficient to support an inference of discriminatory motive. *Naomi Knitting Plant*, supra; *State Equipment, Inc.*, 322 NLRB 631 (1996); *Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), enf'd. 881 F.2d 542 (8th Cir. 1989).

In addition to the timing of Rick Christmann's termination and the Respondent's false and shifting reasons for it, there is other evidence in the record suggesting that his nonmembership in Local 825 was a motivating factor in his termination. Rick Christmann testified credibly that both Beck and Leahy told him that Local 825 wanted him off the job. Al-

though the Respondent is not responsible for these statements, because they were outside the scope of apparent authority held by the two foremen, and the statements are hearsay as to what Local 825 wanted, the statements help to shed light on the Respondent's true motivation in the face of the false and shifting reasons advanced by the Respondent since Rick Christmann's termination. These statements suggest that the Respondent may have been acting at the request of Local 825 when it terminated Rick Christmann. No other credible reason has been advanced for the Respondent's decision.

Accordingly, I find that the General Counsel has established a prima facie case that Rick Christmann's nonmembership in Local 825 was a motivating factor in his termination. Because the reason advanced by the Respondent at the hearing has been found to be pretextual, the Respondent has failed to meet its burden under *Wright Line*, supra. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). I therefore conclude that the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in the complaint by terminating Rick Christmann.

CONCLUSIONS OF LAW

1. Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp., a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local Union No. 138 and Local Union No. 825 are labor organizations within the meaning of Section 2(5) of the Act.

3. By terminating Rick Christmann on February 13, 1998, because of his nonmembership in Local 825, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Although there is evidence in the record that the Stony Lonesome job was completed in August 1998, the Board has declined to adopt a precompliance presumption against reinstatement in the construction industry. Instead, the Board applies its traditional reinstatement and make-whole remedies while leaving reinstatement and backpay issues for resolution at the compliance stage of the proceedings. *Dean General Contractors*, 285 NLRB 573 (1987). The Respondent will have the opportunity in compliance to show that, under its customary procedures, an employee in Rick Christmann's position would not have been transferred to another project after the Stony Lonesome job ended and that any reinstatement and backpay obligation ended at that point.

⁸ In contrast, the reason asserted by the Respondent's counsel in these letters for Al Christmann's termination was consistent with Vander Schuyt's testimony at the hearing.

Because the Stony Lonesome project was completed during the pendency of these proceedings, I shall recommend that the Respondent, in addition to the normal notice posting requirements, mail a copy of the notice to all employees who were working as operating engineers at that job during the period from the date of Rick Christmann's termination until the completion of the project. This is the only effective manner of informing employees who may no longer work for the Respondent that their statutory rights have been vindicated.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp., Freeport, New York, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because of their nonmembership in International Union of Operating Engineers, Local Union No. 825, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Rick Christmann full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Rick Christmann whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Freeport, New York copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"¹¹ to all employees who were employed by the Respondent in classifications covered by the collective-bargaining agreement with Local 825 at its Stony Lonesome jobsite in West Point, New York at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you are not a member of International Union of Operating Engineers, Local Union No. 825, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Rick Christmann full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Rick Christmann whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

¹¹ See fn. 10, above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Rick Christmann, and WE WILL, within 3 days thereafter,

notify him in writing that this has been done and that the discharge will not be used against him in any way.

PETER SCALAMANDRE & SONS, INC. AND SEA CREST
CONSTRUCTION CORP.